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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

No. 74-198

SAMUEL DEWEY YATES,

Petitioner

v.

STATE OF TEXAS,

Respondent

* * *

On Petition for Writ of Certiorari
To The Court of Criminal Appeals
of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas delivered on May 22, 1974, is reported in Yates v. State, 509 S.W. 2nd 600 (Tex.crim.1974) and also appears in the appendix to Petitioner's petition for Writ of Certiorari. Petitioner's leave to file Motion for Rehearing was denied on June 12, 1974.

JURISDICTION

Formal jurisdictional requisites of the petition and its timely filing appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

1. Whether taped conversations between Petitioner and the deceased were admissible as probative evidence.

2. Whether the admission into evidence of taped conversations between Petitioner and deceased was a violation of Petitioner's Sixth Amendment right to confrontation and cross-examination.

3. Whether by failing to properly object at trial Petioner waived review of the admission of taped conversations between Petitioner and the deceased as a violation of Petitioner's Sixth Amendment right to confrontation.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Sixth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution are involved here.

STATEMENT OF THE CASE

Petitioner was indicted in the District Court

of Taylor County for murder with malice in the death of his wife, Mildred Irene Yates. Petitioner was tried before a jury; and, after a finding of guilt, was sentenced to life imprisonment.

At the trial of his case, the State was allowed to place into evidence two telephone conversations between Petitioner and Mildred Irene Yates, which Petitioner had taped some ten months before the homicide. (S.F. 757).

Petitioner objected to the admission of the taped conversations claiming that they were irrelevant and were hearsay. He failed to raise the constitutional issue presented here. (S.F. 757, 779). Moreover, counsel only raised the general objection referred to above (S.F. 779), and did not object to specific portions of the taped conversations. The court overruled the objection and allowed the tapes to be played before the jury.

The constitutional issue of a right to confrontation was first raised in the Texas Court of Criminal Appeals. The opinion of the Court of Criminal Appeals does not mention Petitioner's argument on the constitutional question. Petitioner filed a Motion for Leave to File Rehearing in which he specifically raised the constitutional question for the first time, but the Court of Criminal Appeals of the State of Texas denied the Motion without comment.

ARGUMENT AND AUTHORITIES

1. Clearly the tapes contained evidence admissible in this case.

It is clear that the objection of irrelevancy

is without merit. The tapes contained the following exchange between Petitioner and the deceased:

> MILDRED YATES: Well, you already gave yourself something that I can't give you. As I told you yesterday evening you had to earn it. You've got the kids where they are afraid of you because you kicked me around. You grabbed the gun every time you get mad and do things like that until they are frightened for you to even come out here."
>
> SAM YATES: Don't you realize that you are an alarmist? You have put that fear in them. That they come off over there to what you call it that night?" (S.F. 999,1000).

The issue of self-defense was raised in this case at trial, and there was a real question as to who the aggressor was on the night in question. (S.F. p. 46-47). The above quoted statement was clearly relevant to that issue.

Moreover, the evidence was admissible over the hearsay objection because Defendant failed to deny his wife's account of his blandishments. The statement is thus admissible against him as an admission by conduct. Texas General Indemnity Co. v. Scott, 253 S.W. 2d 651 (Tex.Sup. 1953). See also 4 Wigmore, Evidence Section 1071.

A second conversation admissible under the same principles as the colloquy above was as follows:

> MILDRED YATES: Yeah, we would have be-

cause we got that far already. I don't intend to live with a man that is gonna hit me. He is not no man if he hits a woman."

SAM YATES: Well, Shug, that only time I ever hit you was when you got in the way and got hysterical and started pawing at me, or-."

MILDRED YATES: I got hysterical and got in the way. What kind of a person does this kind of thing, Sam?"

SAM YATES: Well, even a rat will fight if he is cornered."

MILDRED YATES: Oh, don't be funny."

SAM YATES: That's right."
(S.F. 1010,1011)

In addition to being admissible under the admission by conduct exception mentioned above, the tapes were admissible in order to impeach the Defendant's prior testimony. Texas General Indemnity Co. v. Scott, supra. Defendant had testified as follows:

QUESTION: Now, in the course of any of the arguments that you ever had, we have heard some testimony that, I believe from your son, Gary, that at the time Mickey would start arguing and get in these things that you would just leave; is that correct?

ANSWER: Often I would try to leave or walk off from an argument with her. It was difficult, but sometimes this was the only way that I could handle it." (S.F. 591)

With this statement, Petitioner left the impression that his way of handling heated arguments was to walk away from them. A rather different impression is left when one listens to the above quoted portions of the tape.

2. The admission into evidence of taped conversations between Petitioner and deceased was not a violation of Petitioner's Sixth Amendment right to confrontation and cross-examination.

While the confrontation clause and the hearsay rule are not coextensive, they are generally designed to protect similar values. California V. Green, 399 U.S. 149, 155 (1970). Both are designed to protect the accused by affording him the opportunity for cross-examination and by enabling the trier of facts to observe the witness's demeanor as an aid in evaluating his or her credibility and making false accusation more unlikely because of the presence of the accused. See Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

The lack of cross-examination and the lack of presence of the witness at trial is not per se a denial of confrontation. The necessity for these safeguards is obivated to the degree that the testimony itself is intrinsivally reliable. Where tes-

timony has been found to be intrinsically reliable, this Court and other federal courts have found no denial of the right of confrontation despite the lack of cross-examination and physical presence of the witness. Mattox v. United States, 156 U.S. 237 (1895), (dying declarations); Delaney v. United States, 263 U.S. 586 (1924), (declarations of a co-conspirator); Reed v. Beto, 343 F.2d 723 (5th Cir. 1965), (public records); United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1971), (entries in the regular course of business).

The need for cross-examination in the instant case was relatively minimal because the testimony was intrinsically reliable. By his conduct in the conversations with the deceased it is clear that Petitioner was admitting the truth of Mrs. Yates' accusations. Petitioner's admission by his conduct gives Mrs. Yates' testimony a degree of reliability equivalent to that accorded to dying declarations. See Mattox, supra.

The need to have the witness physically present in order to judge her credibility in the instant case was minimal, first, because of the previously mentioned reliability of her testimony, and second, because the conversation was recorded. This latter circumstance enabled the jury to listen to the intonations of both parties during their discussions and was a great benefit to the jury in judging the witnesses credibility. It was a benefit that has not been present even in cases where the court has ruled that hearsay is admissible over the confrontation clause, and is thus an additional counterweight on the side of admissibility.

3. Whatever objection Petitioner had based on constitutional grounds was waived by his failure to raise it in the trial court.

In Henry v. Mississippi, 379 U.S. 443 (1965), this court held that a state rule requiring immediate objection to admission of evidence served a legitimate state interest and thus could be a ground for refusal to review. In the present case, Petitioner failed to properly object to the admission of the taped conversations. In so doing, he ran afoul of a Texas rule on the admission of evidence; a rule which serves a legitimate state interest. Therefore, Petitioner's failure to properly object bars review under the Henry analysis.

Under Texas law, a general objection to evidence as a whole which does not point out specifically the portion objected to is properly overruled if any part of the evidence is admissible. Brown & Root v. Haddad, 180 S.W. 2d 339 (Tex. Sup. 1944); Eubanks v. Winn, 469 S.W. 2d 292 (Tex. Civ. App. writ ref'd. nre 1970). In this case, only general relevancy and hearsay objections were made and many parts of the taped conversations were admissible.

Texas has a legitimate state interest in following the rule of Brown & Root v. Haddad, supra. The rule has a dual purpose in that it affords the other side an opportunity to avoid error and the necessity for a new trial. To review the constitutionality of the admission of these tapes

at this point in the proceedings subverts the legitimate state interest in the efficient conduct of its criminal trials.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on _____, I mailed copies of Respondent's Brief In Opposition to William Lowe Burke, Jr., Attorney for Petitioner, P.O. Box 769, Abilene, Texas 79604.

_____
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CERTIORARI DENIED